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MAY 8 1938

SUPREME COURT OF THE UNITED STATES

No. 82

THE STATE OF ALABAMA, PETITIONER,

VS.

THE UNITED STATES.

BRIEF OF PETITIONERS ON PETITION FOR CERTIORARI.

By

CHARLIE C. MCCALL,
Attorney General of Alabama.

A. A. EVANS,
Assistant Attorney General of Alabama.

THOS. E. KNIGHT, JR.,
Special Assistant Attorney General of Alabama.

BROWN PRINTING CO., MONTGOMERY, 1938

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BRIEF OF PETITIONER

STATEMENT OF THE CASE

This suit was brought by the State of Alabama to enforce collection from the United States of a license or privileeg tax imposed by the State of Alabama upon the business of manufacturing and selling hydro-electric power within the State of Alabama.

The Legislature of the State of Alabama passed a revenue law, approved July 22, 1927, (General Acts of Alabama (fol. 2) 1927, Pages 139 et seq.), which provides, among other things, as follows:

"Section 1. Every person, firm, company, corporation or association engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act or any other Act. * * *"

Section 2D. In addition to all other taxes of every kind now imposed by law or otherwise imposed by this Act, there is hereby levied a license or privilege tax upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama for the privilege of engaging in such business; said license or privilege tax shall be due and payable in advance on the first day of October of each year, and shall be in a sum equal to two-fifths of a Mill (2/5) upon

each kilowatt hour of hydro-electric power manufactured and sold during the preceding calendar year. * * *

Section 72. * * * in all proceedings under this Act, the license due October 1st shall not be delinquent before the first day of November of each year. * * *

During the calendar year 1926, the United States manufactured approximately 432,629,000 kilowatt hours of hydro-electric power at Wilson Dam in the State of Alabama, of which it sold approximately 429,311,000 kilowatt hours to the Alabama Power Company, a corporation carried on by private capital, and the remainder it used for its own purposes. Since October 1, 1927, and continuously up to and including the date that the petition was filed in this case, the United States has exercised the (fol. 3) privilege of manufacturnig and selling hydro-electric power in the State of Alabama to the Alabama Power Company.

The State of Alabama assessed and made demand upon the United States for the payment of the tax imposed by the Act of July 22, 1927, on account of the manufacture of approximately 429,311,000 kilowatt hours and the sale of the same to the Alabama Power Company, in the amount of approximately $173,051.60, but the United States refused to pay the tax. This suit was brought for the collection of that sum, together with interest thereon at eight per cent per annum.

A demurrer to the petition was interposed by the United States and was sustained by the Court of Claims in its decision rendered March 12, 1930. (Record, pages 1 and 2.)

SUMMARY OF POINTS

Argued by Petitioners

1. Jurisdiction of the Supreme Court.

2. The State and Federal Government are equal in their respective scopes of taxing power.

3. The Federal Government, in engaging in a business of a private nature as an incident to the exercise of an implied power under the Constitution, is not cloaked with an immunity from taxation by a State to the same degree that it would be if engaged in performance of an immediate and direct sovereign power.

4. A tax levied upon that hydro-electric power manufactured and sold by the Federal Government does not hamper or cripple the Federal Government in the performance of a governmental function to the same extent that immunity from taxation interferes with the exercise by the State of its taxing power.

ARGUMENT

Opinion of the Court of Claims

The opinion in this case has not been officially reported. The case was decided by the Court of Claims March 12, 1930, and the opinion of the Court appears at pages 9 to 30, inc., of the printed record.

Jurisdiction of the Supreme Court

Judgment of the Court of Claims was rendered March 12, 1920 (R. 30). Petition for certiorari was filed April 15, 1930, (R. 30).

Jurisdiction to issue the writ is conferred upon this Court by Section 3(b) of the Act of February 13, 1925, (Chap. 229, 43 Stat. 936, 939).

Under the above mentioned Section of Chapter 229, (43 Stat.) writ of certiorari was awarded in the case.

Leonard vs. United States, 279 U. S. 40.

THE STATE AND FEDERAL GOVERNMENT ARE EQUAL IN THEIR RESPECTIVE SCOPES OF TAXING POWER.

The two governments are upon an equality. The power of taxation by the states was not abridged by the grant of that power to the Federal Government.

The Federal Government's immunity from taxation, levied by the State, is no more absolute than the same immunity of the State.

The Collector vs. Day, 11 Wall. 113, 20 L. Ed. 122.

THE FEDERAL GOVERNMENT, IN ENGAGING IN A BUSINESS OF A PRIVATE NATURE AS AN INCIDENT TO THE EXERCISE OF AN IMPLIED POWER UNDER THE CONSTITUTION, IS NOT CLOAKED WITH AN IMMUNITY FROM TAXATION, BY A STATE, TO THE SAME DEGREE THAT IT WOULD BE IF ENGAGED IN PERFORMANCE OF AN IMMEDIATE AND DIRECT SOVEREIGN POWER.

Unquestionably the manufacture for the purpose of and the sale of hydro-electric power by the Federal Government to the Alabama Power Company is an undertaking in the nature of a private enterprise.

While it is true that the Government uses 3,000,000 kilowatt hours of the electricity generated, in its operation of the locks at Wilson Dam in aid of navigation, and in the maintenance of the plant, yet the sale of 429,000,000 kilowatt hours is purely a commercial enterprise. The tax is sought only on that amount of the power sold.

If the State attempted to tax that power used by the Government in the performance of its ordinary functions, of course, the decisions of this Court heretofore, would be applicable.

McCullough vs. Maryland, 4 Wheat. 316 et seq., 4 Law. Ed. 579, 606.

Panhandle Oil Co. vs. Knox, 277 U. S. 218, 221.

But the tax is not so imposed.

Could it be contended that the Federal Government could escape a tax upon a sale of gasoline on the theory that it needed a certain amount of gasoline for governmental purposes?

There can be no distinction drawn between the sale of this power by the Federal Government and the dispensation of whiskey by the State of South Carolina as an incident to the exercise of its police power.

South Carolina vs. United States, 199 U. S. 437, 50 L. Ed. 261.

A TAX LEVIED UPON THAT HYDRO-ELECTRIC POWER MANUFACTURED AND SOLD BY THE FEDERAL GOVERNMENT DOES NOT HAMPER OR CRIPPLE THE FEDERAL GOVERNMENT IN THE PERFORMANCE OF A GOVERNMENTAL FUNCTION TO THE SAME EXTENT THAT IMMUNITY FROM TAXATION INTERFERES WITH THE EXERCISE BY THE STATE OF ITS TAXING POWER.

Sovereign immunity from taxation exists because of the doctrine of non-interference by one sovereignty with another engaged in the performance of its ordinary function.

To remove a commodity or an enterprise from the legitimate field of taxation of a government is certainly an interference with that government. It has been held that such claim of immunity may hamper or cripple a sovereignty to a greater extent than the burden of a reasonable tax.

Metcalf et al. vs. Mitchell, 269 U. S. 514.

The tax imposed in the instant case should not and does not unreasonably hamper the Federal Government in the exercise of an immediate and direct sovereign power.

Metcalf et al vs. Mitchell, supra.

In the *Panhandle Oil Company vs. Knox case,* cited *supra,* this Court recognized the right of a dealer to pass a sales tax to the consumer, when it was held that the tax in that instance was a hindrance to the Federal Government in the performance of its governmental functions.

Since the tax in the instant case can be passed to the purchaser of the power manufactured by the Government it can not interfere with the Federal Government to the extent that the removal of that field of taxation from the taxing power of the State interferes with the exercise of an immediate and direct sovereign power of the State.

Metcalf vs. Mitchell, supra.

We respectfully submit that the writ of certiorari should be awarded.

CHARLIE C. MCCALL,
Attorney General of Alabama.

A. A. EVANS,
Assistant Attorney General.

THOS. E. KNIGHT, JR.,
Special Asst. Attorney General.

I hereby certify that I have this day mailed to the Honorable George H. Foster, Attorney for the United States in the above mentioned case, a copy of the foregoing brief and argument, postage prepaid.

This the 2nd day of May, 1930.

THOS. E. KNIGHT, JR.,
Special Asst. Attorney General.